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In re Estate of Taylor Appellant's Brief 2 Dckt. 40479

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IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF THE ESTATE OF)
DONALD LEE TAYLOR,)
Deceased.)
_____)

Docket No. 40479

APPELLANT/CROSS-RESPONDENT'S REPLY BRIEF

Appeal from the District Court of the Fourth Judicial District of
The State of Idaho, in and for the County of Ada

Honorable Kathryn A. Sticklen

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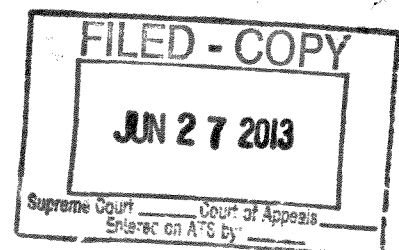


TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CASES AND AUTHORITIES	ii
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	2
Standard of review: summary judgment	2
Failure to preserve issue: denial of attorney fees by district court	2
Genuine issue of material fact	3
Entitlement to fees	3
RESPONDENT/CROSS-APPELLANT HAS FAILED TO PRESERVE THE ISSUE OF HIS ENTITLEMENT TO FEES FOR FRIVOLOUS PROSECUTION	3
EVEN IF RESPONDENT MICHAEL IS DEEMED TO HAVE PRESERVED THE ATTORNEY FEE ISSUE, HE HAS FAILED TO DEMONSTRATE THAT THE DISTRICT COURT ABUSED ITS DISCRETION	4
FEES ON APPEAL ARE NOT WARRANTED IN THIS CASE ON THE GROUNDS OF FRIVOLOUS PROSECUTION	4
RESPONDENT HAS FAILED TO CITE ANY AUTHORITY ENTITLING HIM TO ATTORNEY FEES FOR FRIVOLOUS PROSECUTION	5
CONCLUSION	5
CERTIFICATE OF SERVICE	6

TABLE OF CASES AND AUTHORITIES

CASES	Page
<i>Anderson v. Ethington</i> , 103 Idaho 658, 651 P.2d 923 (1962)	4
<i>Bingham v. Montane Resource</i> , 133 Idaho 420, 427, 987 P.2d 1035 (1999)	4
<i>Capps v. FIA Card Servs.</i> 149 Idaho 737, 240 P.3d 583 (2010)	5
<i>Commercial Ventures v. Lea Family Trust</i> , 145 Idaho 208, 177 P.3d 955 (2008)	5
 CODES	
Idaho Code § 12-121	3, 5
 RULES	
Rule 56 (c), Idaho Rules of Civil Procedure	2, 5
Rule 41, Idaho Appellate Rules	3, 5

Preliminary note: With respect to the central issue in this case, i.e., the propriety of summary judgment, appellant rests on his opening brief. The herein brief focuses mainly on the issue of appellate attorney fees.

STATEMENT OF THE CASE

Appellant and cross-respondent Jeffrey Taylor does not disagree with the facts set forth in respondent's Statement of the Case. However, to the extent the Statement deals with medical issues of decedent's wife and respondent Michael's romantic conduct, it lacks relevancy.

SUMMARY OF ARGUMENT

(1) Standard of review: summary judgment: In his brief, respondent Michael sets forth the standard of review to which the trial court must adhere on a motion for summary judgment. He also identifies the district court's standard of review when sitting as an appellate court.

The respondent fails to address this Court's scope of judicial review where the district court acts as an intermediate appellate court. This standard is set forth at page 5 of Appellant's Brief, citing *Estate of Conway v. Martin*, 152 Idaho 933, 938, 277, P.3d 380 (2012).

On appellate review of summary judgment, this Court exercises free review, i.e., whether there is a genuine issue of "material fact", or not, which renders summary judgment against the law. Rule 56(c), I.R.C.P.

(2) Failure to preserve issue: denial of attorney fees by district court: It does not appear that respondent/cross-appellant Michael is appealing the district court's denial of attorney fees incurred in the intermediate appeal. Respondent Michael fails to frame the "Additional Issue" as whether the district court in its appellate capacity abused its discretion. For example, respondent Michael has not identified the standard of review respecting a district court's denial of attorney fees for frivolous prosecution (R. pp.266, 267), i.e., abuse of discretion. Respondent Michael treats the

issue of appellate fees as being an “Additional Issue on Appeal”, but limiting the issue to attorney fees incurred in the current proceeding. Unless the district court’s appellate decision is overturned, this Court is bound by the finding that the appellant Jeffrey was not frivolous.¹

(2) Genuine issue of material fact: Respondent Michael fails to identify a single fact which is dispositive of the issue of decedent Donald’s testamentary capacity. To the contrary, there is a plethora of evidence arrayed against the existence of such capacity. See Appellant Brief.

(3) Entitlement to fees: The Appellant Brief identifies multiple facts in the record which support the conclusion that the decedent lacked testamentary capacity and that summary adjudication was in error. These same facts support the conclusion that this appeal was not brought frivolously, unreasonably or without foundation.

RESPONDENT/CROSS-APPELLANT HAS FAILED TO PRESERVE THE ISSUE
OF HIS ENTITLEMENT TO FEES FOR FRIVOLOUS PROSECUTION

Respondent Michael frames the “additional issue on appeal” as follows: “Whether Michael is entitled to attorneys fees against Jeffrey pursuant to Idaho Code §12-121 and Rule 41 of the Idaho Appellate Rules”. Framing the fee issue in this manner ignores the fact that the district court ruled that “this appeal is not a frivolous appeal” (R. pp.266, 267). Absent argument for reversal of the district court acting in its appellate capacity, this Court is bound by the lower decision.

Respondent Jeffrey has failed to preserve this issue on appeal, i.e., whether the district court abused its discretion in denying fees for frivolous prosecution. See discussion next section.

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¹ Although Michael requested attorney fees at the magistrate level, the magistrate court never ruled upon the request.

EVEN IF RESPONDENT MICHAEL IS DEEMED TO HAVE PRESERVED
THE ATTORNEY FEE ISSUE, HE HAS FAILED TO DEMONSTRATE THAT
THE DISTRICT COURT ABUSED ITS DISCRETION

Whether to award attorney fees for frivolous prosecution is within the discretion of the Court *Anderson v. Ethington*, 103 Idaho 658, 660, 651 P.2d 923 (1962). In order to ascertain whether that discretion has been abused, a three-pronged test is applied: (1) did the Court perceive it was acting within a discretionary area; (2) did it correctly invoke the applicable standard; and (3) did it do so by an exercise of reason. *Bingham v. Montane Resource*, 133 Idaho 420, 427, 987 P.2d 1035 (1999).

Respondent has failed to identify this standard and has failed to demonstrate in which particulars the district court failed to comply with these criteria. There is no articulated basis for reversing the district court on the attorney fee issue.

FEES ON APPEAL ARE NOT WARRANTED IN THIS CASE
ON THE GROUNDS OF FRIVOLOUS PROSECUTION

The following facts/statements are undisputed: (1) the decedent was suffering from progressive dementia; (2) he was not “competent to made complex decisions:” (R p.111); (3) decedent engaged in bizarre conduct over a period of several months (R. p. 121-143) and (4) it would be difficult for decedent to make a will “in a competent way” (R.p. 115).

The above facts support petitioner Jeffrey’s position that the decedent lacked the requisite competency to make a will. That is, his assertions in this regard are not unreasonable.

As found by the district court on appeal:

While Jeffrey’s claim that the decedent lacked testamentary capacity fails as a matter of law, due to lack of evidence, the Court is not left with the abiding belief that the issue was not fairly debatable or colorable. Consequently, the Court finds that this appeal is not a frivolous appeal, nor was it brought unreasonably or without foundation. Michael’s request for attorney fees is, therefore, denied.

R. pp. 266, 267.

The record in this case does not support an award of attorney fees.

RESPONDENT HAS FAILED TO CITE ANY AUTHORITY ENTITLING HIM
TO ATTORNEY FEES FOR FRIVOLOUS PROSECUTION.

As authority for his fee entitlement based upon frivolous prosecution, respondent Michael cites Idaho Code §12-121 and Rule 41, Idaho Appellate Rules. Rule 41 sets forth the procedure for awarding attorney fees; it does not constitute authority for the award of fees. *Commercial Ventures v. Lea Family Trust*, 145 Idaho 208, 219, 177 P.3d 955 (2008).


Idaho Code §12-121 does not address an award of fees for frivolous prosecution. Rule 54(e)(1), I.R.C.P., although addressing the consequences of frivolous prosecution or defense, does not apply to appellate matters. *Capps v. FIA Card Servs.* 149 Idaho 737, 744, 240 P.3d 583 (2010).

Lacking a citation of authority for the award of fees, respondent's fee request should be denied. *Id.*, 149 Idaho at 745.

CONCLUSION

Appellant/cross-respondent has failed to address whether the intermediate appellate court abused its discretion in denying appellant/cross-respondent's request for attorney fees. Arguably, this issue has thus been waived. In any event, given the factual issues supporting the absence of testamentary capacity, neither this Court nor the below appellate court can be left with the abiding belief this appeal was brought frivolously.

Dated this 27th day of June, 2013.



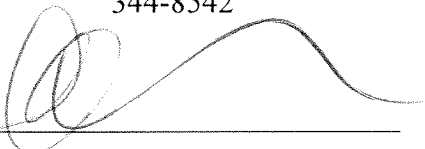
Allen B. Ellis
Attorney for appellant/cross-respondent, Jeffrey L. Taylor

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27th day of June, 2013, I caused to be served two true and correct copies of the foregoing by the method indicated below, and addressed to the following:

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☐ Overnight Mail
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Allen B. Ellis